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INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai

Before Shri S. Rifaur Rahman, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No.6618/Mum/2018
(Assessment Year: 2014-15)

Dow Agrosciences India Private Limited, 1st Floor, Block B, Godrej IT Park, Pirojshanagar, Vikhroli (W) Mumbai – 400 079	Vs.	Asst. Commissioner of Income tax-3(1)(1) [Income-Tax Officer-14(1)(3)] Room No. 458, Aayakar Bhavan, M.K. Road, Mumbai – 400 020
PAN – AAACD3813H		
(Appellant)		**(Respondent)**

Appellant by: Shri Nishant Thakkar, A.R
Respondent by: Shri Sunil Deshpande, D.R

Date of Hearing: 10.02.2021
Date of Pronouncement: 15.02.2021

O R D E R

PER RAVISH SOOD, JM

The present appeal filed by the assessee company is directed against the respective orders passed by the A.O under Sec.143(3) r.w.s 144C(13) of the Income Tax Act, 1961(for short 'Act') for A.Y. 2014-15, dated 19.09.2018. The assessee has assailed the impugned order on the following grounds of appeal before us :

> "Based on the facts and circumstances of the case, Dow AgroSciences India Private Limited referred to as 'the Appellant') respectfully craves to prefer an appeal against the order issued by the Income Tax Officer, ward 14(1)(3), Mumbai [hereinafter referred to as sing Officer'] under section 143(3) read with

section 144C(13) of the Income-tax 1961 ('the Act') in pursuance of the directions issued by the Hon'ble Dispute Resolution Panel-I, (hereinafter referred to as the 'Hon'ble DRP') on the following grounds, each of which are without prejudice to one another.

On the facts and in the circumstances of the case and in law, the learned AO/ Deputy Commissioner of Income-tax (Transfer Pricing) - I(2)(2) ('TPO') on fact and in law has:

GENERAL

1. Erred in assessing the total income at Rs.99,44,02,394 as against returned income of Rs. 66,91,50,480 disclosed in the return of income filed.

TRANSFER PRICING ADJUSTMENTS

1. PAYMENT OF ROYALTY TO ASSOCIATED ENTERPRISE ('AE')

General

2. Erred in making an adjustment of Rs.5,40,32,169 to the total income of the Appellant under Section 92CA(3) of the Act on account of adjustment in the arm's length price of the international transaction of payment of royalty.

Rejection of economic analysis undertaken by the Appellant

3. Erred in not considering approvals received from Secretariat of Industrial Assistance ('SIA'), Ministry of Industry and Reserve Bank of India ('RBI') as valid CUP and rejecting the CUP analysis undertaken by the Appellant as a primary analysis.

4. Erred in not accepting the economic analysis undertaken by the Appellant using Transactional Net Margin Method ('TNMM'), in accordance with the provisions of the Act read with the Income-tax Rules, 1962 ('the Rules'), for the determination of the arm's length price of the international transaction of payment of royalty.

5. Erred in rejecting the aggregation approach adopted by the Appellant using TNMM to benchmark the said international transaction and not appreciating that payment of royalty is closely connected with the main business of the Appellant in relation to manufacturing.

Disregarding the commercial benefits received from the AE

6. Erred in not appreciating that the technical knowhow licensed by the AE to the Appellant was an invaluable and unique intangible which yielded commercial benefits to the Appellant.

7. Erred in not appreciating the commercial rationale of the Appellant for extending the technology agreement as well as making royalty payment to the AE and applying 'benefit test' to hold no benefit is received by the Appellant.

Inappropriately considered supplementary agreement as CUP

8. Erred in considering the supplementary agreement between HERC products and CCT corporation as comparable without giving cognizance to the validity of the agreement as well as the fact that the complete information (i.e. the master agreement) is not available.

9. Without prejudice to the above, failed to appreciate that the supplementary agreement mentions 2 different rates (i.e. 2 percent of the gross value and 5 percent of gross value on sales, based on customer) and conveniently considering the lower royalty rate for making transfer pricing adjustment (i.e. 2 percent).

10. Without prejudice to the above, erred in not considering the fact that royalty rates as mentioned in the agreement is on gross sales value and the rates at which Appellant is paying is based on net sales value.

Inappropriately considering controlled transaction as CUP

11. Erred in comparing the rate of royalty paid by the Appellant to its AE [Dow AgroSciences B.V (Dow Netherlands)], with a controlled transaction i.e. the royalty rate paid by Dow UK, another AE of the Appellant, to Dow Netherlands.

12. Erred in not considering the difference in definition of 'net sales' as per agreement between Appellant and Dow Netherlands and as per agreement between Dow UK and Dow Netherlands

13. Without prejudice to the above, erred in ignoring the fact that prices of the products in UK is significantly different as compared to India, since UK is a developed country and thereby the royalty paid by Dow UK cannot be compared with the royalty paid by the Appellant.

14. Without prejudice to the above, erred in ignoring the fact that there exists technological differences between the technology availed by the Appellant and Dow UK (where the technology was old) and hence the same cannot be taken as comparable.

15. Without prejudice to the above, even if controlled rate of royalty paid by Dow UK to Dow Netherland is taken as CUP, appropriate adjustment should be provided on the same to eliminate the differences.

Variation from the arithmetic mean

16. Without prejudice to the above, the benefit of proviso to section 92C(2) of the Act (Variation of 3% from the arithmetic mean) should be granted to the Appellant, if the transaction payment of royalty is within such range.

(ii) PAYMENT TO AE'S FOR AVAILING OF SERVICES

General

17. Erred in making an adjustment of Rs.24,42,84,844 to the total income of the Appellant under Section 92CA(3) of the Act on account of adjustment in the arm's length price of the international transaction of availing of services.

Rejection of economic analysis undertaken by the Appellant

18. Erred in rejecting the economic analysis undertaken by the Appellant using TNMM, in accordance with the provisions of the Act read with the Rules and instead using hypothetical CUP as the most appropriate method, for the determination of the arm's length price of the international transaction of payment for availing of services from AEs, without providing any cogent reasons for the same.

19. Erred in not appreciating that since costs in relation to the services availed by the Appellant were allocated to the manufacturing, trading and indenting segment which were at arm's length (based on net level margin analysis using TNMM), the transaction of availing services by the Appellant from its AEs also meets the arm's length test.

Inappropriate application of CUP method to benchmark international transaction

20. Erred in not using any of the six methods prescribed under section 92C to benchmark the international transaction of payment for availing of services.

21. Without prejudice to the above, erred in computing the arm's length price by applying some ad-hoc man hour rate to some ad-hoc number of man hours (so called CUP) which is not in accordance with the transfer pricing regulations prescribed in India.

22. Erred in not appreciating the aggregation approach and the fact that one of the basic conditions for applying CUP is availability of the price of the same service in uncontrolled condition and it cannot be hypothetical or imaginary value but real value on which similar transactions have taken place.

Benefit test/commercial expediency for availing services

23. Failed to appreciate the business model and business realities of the Appellant and the role of its AEs and thereby stating that no service is received or benefits have been availed by the Appellant.

Ignored evidences submitted for service availed and benefits derived

24. Erred in stating that the services availed by the Appellant are in the nature of shareholder activities/ routine services without appreciating the nature of services availed from AEs and benefit derived by the Appellant therefrom.

25. Erred in not appreciating the evidences submitted to substantiate services received/ benefits derived/ basis of allocation of costs and disregarded the same without giving any cogent reasons.

CORPORATE TAX ADJUSTMENTS

I. SHORT TERM CAPITAL GAIN ON SALE OF BUILDING

26. Erred in computing the short term capital gain on sale of building at Rs 3,05,52,648 as against Rs 36,17,750 computed by the Appellant.

27. Erred in passing the final assessment order under section 143(3) read with section 144C(13) without taking into account the report of the Department Valuation Officer, as directed by the Hon'ble Dispute Resolution Panel.

28. Erred in considering the stamp duty value of the building amounting to Rs.3,58,42,240 as the lull value of consideration' as against the actual sale consideration of Rs.89,07,342, as determined by a Government Approved Valuer, registered under the Wealth tax Act, 1957.

29. Erred in disregarding the valuation of building done by the Government Approved Valuer, registered under the Wealth Tax Act, 1957.

II. Credit for tax deducted at source ('TDS')

30. Erred in granting short credit of TDS amounting to Rs 2,07,68,263

III. Levy of interest under section 234A of the Act

31. Erred in levying interest of Rs.28,68,542 under section 234A of the Act even though the return of income was filed by the Appellate within the due date of filing the return of income under section 139(1) of the Act.

IV. Lew of interest under section 234B of the Act

32. Erred in levying interest of Rs.7,74,50,634 under section 234B of the Act.

V. Initiation of proceedings under section 271(1)(c) of the Act

33. Erred in initiating the penalty proceedings under section 274 read with section 271 (1)(c) of The appellant craves leave to add, alter, amend, delete or withdraw any or all of the grounds of lat or before the hearing of the appeal so as to enable the Income tax Appellate Tribunal s the appeal according to law."

2. Briefly stated, the assessee company which is engaged in the business of manufacturing and trading of pesticides, agro chemicals & seeds had e-filed its return of income for A.Y. 2014-15 on 28.11.2014, declaring its total income at Rs.66,91,50,480/-. The case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. Observing that the assessee company had during the year under consideration entered into international transactions with its Associate Enterprises (for short "AEs"), the A.O made a reference under Sec. 92CA(1) of the Act to the Dy. Commissioner of Income-tax (TP)-1(2)(2), Mumbai (hereinafter referred to as "TPO") for determining the Arm's Length Price of the said transactions. The TPO vide his order passed under Sec. 92CA(3), dated 31.10.2017 made an adjustment of Rs. 29,83,17,013/- to the ALP of the international transactions of the assessee, as under:

Sr. No.	Particulars	Amount
1.	Adjustment to the ALP of royalty paid by the assessee to its AE viz. Dow AgroSciences BV.	Rs. 5,40,32,169/- -
2.	Adjustment on account of Intra Group Services	Rs.24,42,84,844/-.
	Total	Rs.29,83,17,013/-

4. The A.O after receiving the order passed by the TPO under Sec. 92CA(3), dated 31.10.2017 passed a draft assessment order under Sec. 143(3) r.w.s 144C(1), dated 22.12.2017 and proposed to assess the income of the assessee company at Rs.99,44,02,390/-.

5. Objecting to the additions proposed by the A.O the assessee carried the

matter before the Dispute Resolution Panel-1, Mumbai (for short "DRP"). Insofar the issue of determination of ALP of the payment of royalty by the assessee to its AE, viz. Dow AgroSciences BV, Netherland was concerned, the DRP observing that the facts therein involved in context of the aforesaid issue in the assessee's case for the year in question were pari materia with the facts as were there in its case for A.Y 2011-12 thus, followed the view taken by the predecessor panel and upheld the transfer pricing adjustment made by the TPO and rejected the objection of the assessee. As regards the objection pertaining to the transfer pricing adjustment of Rs. 24,42,84,844/- made by the A.O regarding the intra-group services received by the assessee from its AEs, the DRP was of the view that the facts of the case and assessee's submissions and the issues at hand were squarely covered against the assessee by the order of the predecessor panel in A.Y 2011-12 thus, holding a conviction that he facts for the year in question were pari materia with the facts as were there before the predecessor panel in the assessee's case for A.Y 2011-12, therein respectfully followed the same and rejected the assessee's objection in context of the aforesaid issue.

6. After receiving the order passed by the DRP under Sec. 144C(5), dated 04.09.2018 the A.O framed the assessment under Sec. 143(3) r.w.s 144C(13), dated 19.09.2108 and determined the total income of the assessee company at Rs.99,44,02,390/-.

7. Aggrieved, the assessee has assailed the assessment order passed by the A.O under Sec. 143(3) r.w.s 144C(13), dated 19.09.2018 in appeal before us. As observed by us hereinabove, the assessee is aggrieved with the assessment order on account of the aforesaid two transfer pricing adjustments carried out by the A.O/TPO, viz. (i) transfer pricing adjustments as regards the transaction of payment of royalty by the assessee to its AE viz. Dow AgroSciences BV : Rs.5,40,32,169/-; and (ii) transfer pricing adjustment as regards the intra-group

services: Rs. 24,42,84,844/-.

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. At the very outset of the hearing of the appeal it was submitted by the ld. Authorised representative (for short "A.R") for the assessee that the issues pertaining to the transfer pricing adjustment both as regards viz. (i) royalty paid by the assessee to its AE, viz. Dow AgroSciences BV, Netherland; and (ii). intra-group services received by the assessee from its AEs, was squarely covered by a recent order passed by the Tribunal in the assessee's own case for A.Y 2011-12 in ITA(TP)A. No. 203/2016, dated 11.01.2021. It was submitted by the ld. A.R that the DRP had while disposing off the assessee's objections for the year in question simply relied on its earlier order for A.Y 2011-12 and had not given any independent findings. In order to buttress his aforesaid claim the ld. A.R took us through the order of the DRP for the year in question.

9. Per contra, the ld. Departmental representative (for short "D.R") relied on the orders of the lower authorities. However, the ld. D.R could not controvert the claim of the counsel for the assessee that the issues pertaining to the transfer pricing adjustments for the year in question were squarely covered by the order of the tribunal in the assessee's own case for A.Y 2011-12 in ITA(TP)A. No. 203/2016, dated 11.01.2021.

10. We have perused the order of the DRP for the year in question and find that insofar the issues pertaining to the transfer pricing adjustments are concerned, viz.(i) royalty paid by the assessee to its AE, viz. Dow AgroSciences BV, Netherland; and (ii). intra-group services received by the assessee from its AEs, the panel had merely relied on its earlier order passed in the case of the

assessee for A.Y 2011-12 and had not given any independent findings as regards the said respective issues. Accordingly, in the backdrop of the aforesaid admitted factual position we shall deal with the respective issues pertaining to the transfer pricing adjustment made by the A.O/TPO in the backdrop of the view taken by the Tribunal in A.Y 2011-12 in its order passed in ITA(TP)A. No. 203/2016, dated 11.01.2021.

11. Insofar the issue pertaining to the transfer pricing adjustment w.r.t royalty paid by the assessee to its AE, viz. Dow AgroSciences BV, Netherland is concerned, the Tribunal, vide its order passed in the assessee's own case for A.Y 2011-12 in ITA(TP)A. No. 203/2016, dated 11.01.2021, had in context of the said issue observed as under:

> 12. We shall now deal with the sustainability of the view arrived at by the TPO/DRP as regards the determination of the ALP of the royalty paid by the assessee to its AE, viz. Dow AgroSciences BV. As observed by us at length hereinabove, the TPO/DRP were of the view that as per the Process Technology Agreement, dated 23rd January, 1997, the assessee was obligated to pay royalty to its AE viz. Dow AgroSciences BV on manufacturing of "Chlorpyrifos" for a period of only 7 years. Lower authorities were of the view that as per Clause 11.1 of the aforesaid "agreement", the assessee after fully meeting all its obligations provided in the agreement would be vested with a fully paid, non-assignable and non-exclusive right for the process utilizing technology received prior to consummation of the same. Further, it was observed by the lower authorities that as per Clause 11.1 a fresh "agreement" was to be entered into only in the event new technology was received by the assessee company. Being of the view that as the assessee had not received any new technology from its AE, the TPO/DRP held a conviction that the assessee was under no obligation to pay any royalty to the AE beyond the aforesaid stipulated period of 7 years. Backed by their aforesaid conviction, the TPO/DRP had determined the arm's length price of the royalty paid by the assessee to its AE at Nil.
>
> 13. We have given a thoughtful consideration to the aforesaid observations of the lower authorities and for a fair appreciation of the issue under consideration cull out the relevant extract of Clause 11.1 of the aforesaid "agreement", dated 23.01.1997, which reads as under :
>
> **"ARTICLE 11 - TERM AND TERMINATION**

11.1 This Agreement shall commence on the Effective Date and consummate at the end of the later of (a) ten (10) years after the Effective Date, or (b) seven (7) years after the Commencement of Production Date unless otherwise extended, cancelled or terminated under the provisions of this Agreement. The obligations of the parties for further technology exchange under Article 4 shall cease at the end of the seventh (7th) year after the Commencement of Production Date.

A. Upon fully meeting all its obligations under this Agreement, LICENSEE shall have a fully-paid, non-assignable, non-exclusive right, without the right to sub-license: to practice, only at the Plant, the Process utilizing Technology received prior to such consummation, and to use and sell Product made thereby and Product Formulations formulated from such Products, in India and export for sale to such countries outside India as may be mutually agreed in writing from time to time between LICENSOR and LICENSEE.

B. In the event LICENSEE subsequently wishes to receive from LICENSO any additional technical information related to the production of Product or to use Technology received under this Agreement outside the scope o the license granted in this Article 11.1 subsequent to consummation of this Agreement, it shall first negotiate a new technology license agreement with LICENSOR."

On a perusal of the aforesaid clause, we find that the same inter alia places the respective parties at a liberty to extend the same. As per the "agreement" the licensee i.e the assessee after meeting all its obligations under the original "agreement", dated 23.01.1997 would stand vested with a fully paid, non-assignable and non-exclusive right, though without any right to sub-license, and would be entitled to practice, only at the plant, the process utilizing technology that was received prior to the consummation of the said agreement. It was therein further provided that if the licensee i.e the assessee subsequent to consummation of the aforesaid "agreement" wished to receive from the licensor i.e its AE, viz. Dow AgroSciences BV any <u>additional technical information</u> <u>related to the production of product</u> <u>or</u> <u>to use technology received under the aforesaid agreement</u>, it would be required to negotiate a new technology license agreement with the aforesaid licensor. It is the claim of the ld. A.R that the lower authorities had erred in drawing adverse inferences as regards the royalty paid by the assessee to its AE during the year under consideration, for the reason, that they were of the view that as the assessee had not received any new technology from the AE during the year, it was, thus, not obligated to pay any royalty to its AE. Rebutting the aforesaid observations of the lower authorities, it was submitted by the ld. A.R that the TPO vide his "remand report", dated 14th, November, 2014 had accepted that the assessee had received technical assistance from its AE. However, the TPO observed that as the technical assistance received by the assessee from its AE was general in nature and no new technology was received from the AE, therefore, the assessee was not obligated to pay any royalty to its aforesaid AE. In other words, the TPO was of the view that it was only if the assessee after the consummation of the aforesaid

original "agreement" wished to receive any new additional technology, it was only then required to enter into a new "agreement" with its AE. Backed by his aforesaid observation, the TPO was of the view that the assessee ought to have only reimbursed the expenses for the technical assistance received from its AE and was not required to pay any royalty. On a perusal of the aforesaid Clause 11.1(B), we find that the same provides that if the assessee after the consummation of the original "agreement" wished to receive from the licensor i.e the AE any additional technical information related to the production of product or to use technology received under the terms of the said agreement, it would be required to negotiate a new technology license "agreement" with the licensor. However, we find that the DRP had wrongly observed that as per Clause 11.1 of the aforesaid "agreement" the new agreement was to be executed only if the assessee company received any additional technology. As observed by the DRP, since the assessee had not produced any evidence of having received any new technology, therefore, it was not obligated to pay any royalty to its AE. Summing up, the Clause 11.1 required the AE to provide additional information in relation to the technology already provided. In the backdrop of the observation of the TPO in his 'remand report' that the assessee had during the year under consideration got some kind of technical support from its AE, we are unable to comprehend as to on what basis it has thereafter been concluded by the lower authorities that no new "agreement" was required to be executed by the assessee with its AE. Admittedly, after consummation of the original "agreement", dated 23.01.1997 the assessee was to be vested with a fully paid, non-assignable and non-exclusive right, though without any right to sub-license, and would be entitled to practice, only at the plant, the process utilizing technology that was received during the period of the aforesaid original "agreement", dated 23.01.1997, and thus, remained under no obligation to pay any royalty to its AE for use of the aforesaid technology. But then, if the assessee after the consummation of the original "agreement" wished to receive from the licensor i.e the AE any additional technical information related to the production of product or to use technology received under the terms of the said agreement, it was required to negotiate a new technology license "agreement" with the licensor. At the outset, we may herein observe that we are unable to persuade ourselves to subscribe to the construing of Clause 11.1 of the original "agreement" by the DRP. As observed by us hereinabove, if the assessee after the consummation of the original "agreement" wished to receive any additional technical information related to the production of the product or to use the technology received under the said "agreement", then, it was required to negotiate a new technology license "agreement" with the licensor i.e the AE. On a perusal of the 'remand report' of the TPO, we find that he had accepted that the assessee had during the year under consideration received technical assistance from its AE. We may herein observe that it is the claim of the assessee that as it does not carry any research activity in respect of the product viz. "Chlorpyrifos" manufactured by it, and for the technology support is completely dependant on its AE which carries out the research activity, therefore, in the absence of constant support in terms of improvements, new process and latest updates it

would not have been able to manufacture and sell the competitive products. In order to drive home its claim that it had during the year under consideration received additional technical information related to the production of the product or to use the technology received under the original "agreement", the assessee had filed with the DRP by way of "additional evidence" a letter dated 19.09.2014, (Page 467 – 476 of APB) demonstrating at length the aforesaid factual position. As observed by us hereinabove, the TPO after perusing the aforesaid "additional evidence" had accepted that the assessee had received technical assistance from its AE. In our considered view the receipt of technical assistance by the assessee during the year under consideration from its AE being related to the production of the product and/or use of the technology received as per the original "agreement", after its consummation, safely justified negotiation of the new technology license "agreement" between the assessee and the licensor i.e the AE, and thus, the payment of royalty as per the terms therein contemplated. Also, we find substantial force in the claim of the ld. A.R that the TPO/DRP had wrongly construed the Clause 11.1(B) of the original "agreement". All that Clause 11.1(B) required was receipt of additional technical information in relation to the technology already received by the assessee as per the original "agreement". However, the lower authorities had wrongly observed that the "agreement" required receipt of new technology by the assessee from its AE. Be that as it may, we find substantial force in the claim of the assessee that now when on the basis of the supplementary royalty "agreement", dated 08th June, 2005 that was made effective from 01st June, 2004, i.e A.Y 2005-06 the assessee had received necessary technical know-how and assistance from its AE, which had consistently been accepted by the department upto A.Y 2009-10, therefore, in respect of the same "agreement" the department could not take a contrary stand during the year under consideration and therein assail the very existence of the same. To sum up, it is the claim of the assessee that now when the department had for the period A.Y 2005-06 to A.Y 2009-10 accepted the technical know-how and assistance received by the assessee from its AE, it could not during the year in question i.e A.Y 2010-11 assail the validity of the said "agreement". Admittedly, the aforesaid supplementary royalty "agreement", dated 08th June, 2005 (effective from 01st June, 2004) had been accepted by the department for the period A.Y 2005-06 to A.Y 2009-10. Apropos the rejection of the supplementary royalty "agreement" which remains the same during the year under consideration, we are of the considered view that the department by so doing is trying to approbate and reprobate the same i.e *quod approbo no reprobo*, which is not permissible. On the basis of our aforesaid observations, we not being able to persuade ourselves to subscribe to the view taken by the TPO/DRP that the assessee after consummation of the original "agreement" was not obligated to pay any royalty to its AE, vacate the same.

14. We shall now deal with the observation of the TPO/DRP that the approval provided by the RBI would not constitute a valid CUP data, since the RBI does not take into account the transfer pricing provisions to determine the appropriate rates which can be considered as the arm's length price for the payment. As

observed by us hereinabove, royalty paid by the assessee had been approved by the Secretariat of Industrial approval, Ministry of Industry (Government of India) and RBI, vide their approvals, dated 17th September, 1996 and 22nd January, 1997, respectively. Apart from that, the royalty paid by the assessee during the year under consideration i.e @ 8% of its net export sales was also in conformity with the "Press Note No. 2 (2003 series)" that was issued by the Government of India on 24th June, 2003. Rule 10B(2)(d) of the Income Tax Rules, 1962 inter alia provides that for the purpose of determining the arm's length price, the laws and government orders in force must be considered. For the sake of clarity the relevant extract of Rule 10B is reproduced as under:

> "(d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of completion and whether the markets are wholesale or retail."

Accordingly, now when the royalty paid by the assessee to its AE was approved by the Government of India and RBI by their respective approvals dated 17th September, 1996 and 22nd January, 1997, and the same was also in conformity with the rates that were prescribed in the "Press Note No. 2 (2003 series)", dated 24th June, 2003, therefore, no infirmity could be related to the assessee in considering the same for benchmarking the royalty paid by the assessee to its AE using CUP method. Insofar the reliance placed by the TPO on the judgment of the **Hon'ble High Court of Punjab and Haryana** in the case of **Coca Cola India Inc. Vs. Asst. CIT (2009) 309 ITR 194 (P&H)**, we find that the said order had been relegated by the **Hon'ble Supreme Court** vide its order, viz. **M/s Coca Cola India Inc. Vs. Addl. CIT & Ors. [SLP (Civil) No(s). 646/2009, dated 25.10.2010]** to the file of the lower authorities before whom the proceedings were pending. Also, we find, that the **Hon'ble High Court of Bombay** in the case of **CIT Vs. SI Group India Ltd. (2019) 107 taxmann.com 314 (Bom)** and **CIT Vs. SGS India Pvt. Ltd. (2015) 94 CCH 338 (Bom)**, had held, that where the payment made by the assessee to its AE is within the limits prescribed by the Government of India, then, the same can be considered as being at arm's length. In fact, we find that the DRP in the assessee's own case for A.Y 2012-13 by relying on the judgement of the Hon'ble High Court of Bombay in the case of SGS India Pvt. Ltd. (supra) had though accepted that the issue as regards determining of the arm's length price of the royalty transaction was in favour of the assessee, however, only for the purpose of keeping the issue alive it had declined to accept the said claim of the assessee. Also, a similar view had been taken by the Tribunal in the assessee's own case for A.Y. 2004-05 to A.Y 2009-10, and it has been held that the royalty paid by the assessee to its AE having been approved by the Government of India/RBI and being as per the rates prescribed in the Press Note No. 2 (2000 series) was to be taken as being at arm's length. In the backdrop of the aforesaid facts, we adopt a similar view and conclude that as the royalty paid during the year under consideration by the assessee to its AE @ 8% of its net exports was approved by the Government of

India and RBI, and also, in conformity with the rates prescribed in Press Note No. 2 (2003 series), thus, the same on the said count too was to be held as being at arm's length.

15. We shall now advert to the contentions advanced by the ld. A.R that the lower authorities could not have questioned the commercial expediency of the transaction of payment of royalty by the assessee to its AE, as their jurisdiction under "Chapter X" of the Act was restricted to determination of the arm's length price by following one of the methods provided in Sec. 92C of the Act. As observed by us hereinabove, it is a matter of fact borne from the records that the TPO in the course of the remand proceedings had vide his report dated 14th November, 2014 accepted that the assessee had received technical assistance from its AE. On a perusal of the order passed by the TPO, we find that he had without following any of the methods prescribed in Sec. 92C of the Act determined the arm's length price of the royalty paid by the assessee to its AE at Nil, for the reason, that as per him the assessee was not required to pay any royalty without receiving any new technology from the AE. In our considered view the TPO had clearly traversed beyond scope of his jurisdiction which is restricted to determination of the arm's length price of the transaction by following any of the method provided in Sec. 92C of the Act. Also, the TPO is not vested with any jurisdiction to question the commercial expediency of the transaction carried out by the assessee with its AE, and his jurisdiction is restricted to determining of the arm's length price of the transaction. Our aforesaid view is fortified by the following judicial pronouncements:

"(a) CIT vs. Lever India Exports Ltd. (78 taxmann.com 88)
(b) CIT vs. Merck Ltd. (73 taxmann.com 23)
(c) CIT vs. Johnson & Johnson (80 taxmnn.com 269)
(d) CIT vs. RK Ceramics India P. Ltd. (78 taxmann.com 230)
(e) Firmenich Aromatics India (P) Ltd. Vs. DCIT (96 taxmann.com 649)"

In the backdrop of the aforesaid facts, now when the TPO without following any of the methods prescribed under Sec. 92C of the Act had determined the ALP of the royalty paid by the assessee to its AE at Nil, the same, on the said count also is liable to be struck down.

16. We shall now deal with the sustainability of the alternate transfer pricing adjustment of Rs.1,37,52,774/- that was made by the TPO by selecting CUP method and considering an "agreement" entered into between two group companies of the assessee i.e Dow UK King Lynn Plant (Dow, UK) with Dow BV (Dow Netherland), whereby Dow, UK had paid royalty @ 3% of its domestic sales and @ 5% of its export sales for manufacture and sale of "Chlorpyrifos". Adopting the aforesaid comparable, the TPO by considering the royalty @ 5% of the export sales as being at arm's length had suggested an alternate adjustment of Rs.1,37,52,774/-. As per the TPO, the aforesaid alternate adjustment was to

be invoked if the primary adjustment i.e determining of the ALP of royalty paid by the assessee to its AE at nil was deleted by the appellate authorities. As observed by us hereinabove, the DRP had also upheld the determining of the alternate adjustment of the ALP by the TPO.

17. We have deliberated at length on the aforesaid issue and are unable to persuade ourselves to accept the determining of the alternate transfer pricing adjustment of 5% of the export sales made by the TPO. Admittedly, the aforesaid transaction acted upon by the TPO for benchmarking the royalty paid by the assessee to its AE is a transaction between two AE's and hence, the same by no means could have been regarded as a valid comparable. As per Sec. 92F(ii) of the Act, the Arm's Length Price means a price which is applied or proposed to be applied in a transaction between persons other than associated enterprises in uncontrolled conditions. Also, Rule 10B(1)(a) provides that for the purpose of applying CUP method the price paid by the assessee to its AE is to be compared with an uncontrolled transaction. Insofar the definition of "Uncontrolled transaction" is concerned, the same is provided in Rule 10A(ab), as per which, the same means a transaction between enterprises other than associated enterprises, whether resident or non-resident. As the aforesaid transaction considered by the TPO is between two AE's, the same, thus, being in blatant violation of the mandate of Sec.92F(ii) r.w. Rule 10B(i)(a) could not have been considered for the purpose of determining the arm's length price of the royalty paid by the assessee to its AE. Our aforesaid view is supported by the decision of a 'third member' of the ITAT, Mumbai in the case of **Tecnimont ICB P. Ltd. Vs. Addl. CIT (2012) 24 taxmann.com 28 (Mum)(TM)**. In the said case, it has been held by the Tribunal that a controlled transaction or a transaction with an AE cannot be taken as a comparable for the purpose of determining the arm's length price of an international transaction of the assessee with its AE. Accordingly, in the backdrop of our aforesaid deliberations, we herein vacate the alternate transfer pricing adjustment of Rs.1,37,52,774/- made by the TPO.

18. We shall now deal with the sustainability of the arm's length price determined by the TPO in the course of the remand proceedings by benchmarking the royalty transaction on the basis of an "agreement" between AARC Corporation and CCT Corporation found in the Royaltstat database. As observed by us hereinabove, the TPO in the course of the remand proceedings by selecting an "agreement" between two parties viz. AARC Corporation and CCT Corporation from the Royaltstat database had in his 'remand report', dated 13.11.2014 suggested to the DRP an alternate arm's length price for the royalty paid by the assessee to its AE @ 2% of the export sales. As such, the TPO had proposed an alternate adjustment in the event the determination of the arm's length price by him vide his order passed u/s 92CA(3) did not find favour with the appellate authorities. As observed by us hereinabove, the aforesaid view of the TPO was also approved by the DRP.

19. The ld. A.R had objected to the adoption of the royalty agreement

between the aforesaid third parties, viz. AARC Corporation and CCT Corporation for benchmarking of the royalty paid by the assessee to its AE. In order to drive home his claim that the aforesaid "agreement" could not be considered for the purpose of benchmarking, the ld. A.R had drawn our attention to the aforesaid 'agreement', Page 1983 of APB.

20. We have given a thoughtful consideration to the objections raised by the ld. A.R as regards selection of the aforesaid "agreement" for benchmarking the royalty paid by the assessee to its AE and find favour with the same, for the reasons culled out as under :

(i) On a perusal of the records, we concur with the ld. A.R that what has been relied and acted upon by the TPO is only an "amendment agreement" and as the full "agreement" is neither available in the Royaltstat database nor in the public domain, therefore, in the absence of the terms and conditions being available the same could not have been adopted for benchmarking the payment of royalty by the assessee to its AE.

(ii) As per the aforesaid "amendment agreement" royalty at the rate of 2% was payable only up to 31st December, 2006, and for the year under consideration the royalty was payable as per Clause C.9(b), as it was not applicable during the year in question before us. As per Rule 10B(4), the data to be used for analysing the comparability of an uncontrolled transaction shall be the data relating to the financial year in which the international transaction has been entered into between the assessee and its AE. Since the "agreement" selected by the TPO was not in force during the year, therefore, we agree with the ld. A.R that the same could not have been considered for the purpose of benchmarking the payment of royalty by the assessee to its AE.

(iii) As the aforesaid "agreement" had been entered into between the parties based in USA, therefore, on account of geographical difference between the aforesaid agreements the same could not have been feasibly adopted for the purpose of comparability.

(iv) Lastly, we find that as the products licensed under the aforesaid "amendment agreement" are biological granular matrix pest control as opposed to "Chlorpyrifos" in the case of the assessee, therefore, on account of the variance in the products also the aforesaid "agreement" could not have been selected for the purpose of comparability.

In the backdrop of our aforesaid observations, we are of the considered view that the benchmarking of the royalty paid by the assessee to its AE could not have been carried out by selecting the aforesaid royalty "agreement". Accordingly, we vacate the alternate benchmarking that was suggested by the TPO in the course of the remand proceedings.

21. Although we have held that as the royalty paid by the assessee to its AE was approved by the Government of India and RBI, vide their respective approvals dated 17th September, 1996 and 22nd January, 1997, and was also in conformity with the rates prescribed in the "Press Note No. 2 (2003 series)", dated 24th June, 2003, therefore, no infirmity did emerge from considering of the same for benchmarking the royalty paid by the assessee to its AE using CUP method, however, for the sake of completeness we shall deal with the sustainability of the secondary analysis carried out by the assessee following TNM method. As observed by us hereinabove, the assessee had carried out a secondary analysis to ascertain the arm's length price of the royalty paid to its AE by applying the TNM method. As stated by the assessee, since the royalty transaction is clearly linked to the manufacturing activity, it had, therefore, analyzed the same alongwith the manufacturing transaction using a combined transaction approach. As the margin earned by the assesee from the manufacturing activity (after considering the amount of expense on royalty payment) was much higher (19.09%) than the margins earned by the other comparables (10.30%), the margin earned from the manufacturing activity was held to have met the arm's length test. Accordingly, the assessee had concluded that the royalty payment being the operating cost for the manufacturing segment was at arm's length. On a perusal of the orders of the lower authorities, we find that they had accepted the benchmarking analysis applying the TNM method for all other transactions. We find that the CUP method cannot be applied as the TPO has not been able to find a similar transaction which could be compared with the transaction of the assessee company. As regards the remaining methods, viz. Resale Price Method (RPM), Cost Plus Method (CPM) and Profit Split Method (PSM), the same are not applicable to the aforesaid transaction under consideration i.e payment of royalty by the assessee to its AE. As such, we are of the considered view that since comparable transactions cannot be found under the CUP method AND RPM, CPM & PSM are not applicable on the prevalent facts, therefore, the transaction of payment of royalty by the assessee to its AE had rightly been benchmarked by the assessee by applying the TNM method. Our aforesaid view is supported by the following judicial pronouncements, wherein it has been held the transaction of payment of royalty by an assessee to its AE can be benchmarked by applying TNM method:-

(i). Good Year India Ltd. Vs. DCIT (2016) 70 taxmann.com 67 (Delhi)

(ii). Frigoglass India P. Ltd. Vs. DCIT (2016) 68 taxmann. Com 370)(Delhi)

(iii) DCIT Vs. Air Liquide Engineering India P. Ltd. (2014) 43 taxmann.com 299 (Hyd).

(iv). Daksh Business Process Services P. Ltd. Vs. DCIT (2016) 72 txamann.com 44 (Delhi)

In the backdrop of our aforesaid deliberations, we are of the considered view that

as the net margin of the assessee company is shown to be higher than the margin of the comparables, therefore, the adjustment made by TPO/DRP on the said count also could not have been sustained.

22. On the basis of our aforesaid observations, we herein conclude that the transfer pricing adjustment made by the AO/TPO as regards the royalty paid by the assessee company to its AE viz. Dow AgroSciences BV cannot be sustained and is liable to be vacated. Accordingly, we herein direct the A.O to delete the transfer pricing adjustment of Rs. 4,29,47,493/-. The **Grounds of appeal Nos. 1 to 13** are allowed in terms of our aforesaid observations."

As the order of the DRP for A.Y 2011-12 that was relied upon by the panel while disposing off the objections of the assessee as regards the issue pertaining to the transfer pricing adjustment made by the TPO towards payment of royalty by the assessee to its AE, viz. Dow AgroSciences BV, Netherland had been set aside by the Tribunal, we thus concurring with the view therein taken respectfully follow the same. Accordingly, we herein direct the A.O/TPO to vacate the transfer pricing adjustment as regards the royalty of Rs.5,40,32,169/- paid by the assessee to its AE. The **Grounds of appeal Nos. 1 to 16** are allowed in terms of our aforesaid observations.

12. We shall now advert to the grievance of the assessee that the lower authorities had erred in making a transfer pricing adjustment of Rs. 24,42,84,844/- as regards the Intra-Group Services received by the assessee from its AEs, viz. information technology services, financial and treasury support services, financial and accounting support services and legal and administrative support services. As observed by us hereinabove, the DRP while rejecting the objection that was raised by the assessee before it w.r.t the transfer pricing adjustment made by the TPO as regards the intra-group services received by the assessee from its AEs, had merely followed the view that was taken by the panel while disposing off the assessee's objections in context of the said issue in A.Y 2011-12. As pointed out by the ld. A.R, the order passed by the A.O u/s 143(3) r.w.s 144C(13), dated 24.01.2017 for A.Y 2011-12 as regards the transfer pricing

adjustment w.r.t the intra-group services received by the assessee from its AEs had thereafter been vacated by the Tribunal vide its order passed in ITA No. 203/Mum/2016, dated 11.01.2021. We have perused the aforesaid order of the Tribunal and find the aforesaid claim of the ld. A.R to be in order. In its aforesaid order for A.Y 2011-12 in ITA No. 203/Mum/2016, dated 11.01.2021, the Tribunal while vacating the transfer pricing adjustment made by the A.O/TPO as regards the intra-group services received by the assessee from its AEs had observed as under:

> "24. We have heard the authorized representatives for both the parties in context of the aforesaid issue of benchmarking the intra-group services received by the assessee from its AEs, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. On a perusal of the records, we find that the TPO at the fag end of the proceedings on 25th January, 2014 [i.e 5 days before the expiry of the time limit for passing the order under Sec. 92CA(3)] had called upon the assessee to furnish the details of the services which were rendered by its AEs. As the assessee was allowed insufficient time, therefore, it had vide its letter dated 29th January, 2014 submitted the details as regards the services rendered by the AEs to the extent the same at the relevant point of time were readily available with it. After perusing the details furnished by the assessee, it was observed by the TPO that the assessee had failed to establish the services rendered by its AEs on the basis of supporting documents and evidence which were required to be maintained. Also, it was observed by the TPO that the assessee could not produce any evidence relating to direct and tangible benefits that was received by it from the services rendered by the AEs. Backed by his aforesaid observations, the TPO determined the arm's length price of the aforesaid services at Nil.
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> 25. On a perusal of the order of the DRP, we find that the assessee vide its letter dated 19th September, 2014 had in order to substantiate the availing of services from its AEs along with the benefits derived from the rendering of the same filed "additional evidence" before the panel. On being confronted with the aforesaid documentary evidence, it was submitted by the TPO in his "remand report" that the evidence and e-mails produced by the assessee were general in nature and were not commensurate to the amount of expenditure that was claimed in terms of the cost benefit analysis. Apart from that, we find, that it was observed by the TPO that the assessee had not provided quantification of the services in terms of actual expenditure incurred and the benefits derived there from. It was observed by the DRP that the "additional evidence" produced by the

assessee in the form of e-mails, templates and screen shots were general in nature and did not prove the amount of contribution the AEs would have made by rendering the services to the assessee company. Also, it was observed by the DRP that the assessee had not submitted evidence relating to the cost that was incurred by the AEs and the commensurate benefit derived there from on the basis of which it could be held that the payments made by the assessee were found to be at arm's length. Further, the DRP rejected the benchmarking carried out by the assessee by applying the TNM method and upheld the determination of the arm's length price of the intra-group services received by the assessee from its AEs at Nil by the TPO.

26. On a perusal of the orders of the lower authorities and the records before us, we find that it is a matter of fact borne from records that the TPO by calling upon the assessee on 25th January, 2014 (5 days before the time limit) to furnish the details and evidence to support its claim of having received intra-group services from the AEs, had afforded insufficient time for doing the needful. In the backdrop of the aforesaid fact, the assessee in order to substantiate its claim of having received the intra-group services from its AEs had vide its letter dated 19th September, 2014 furnished "additional evidence" with the DRP. On a perusal of the "remand report" of the TPO dated 13th November, 2014, we find that although he had accepted that services were received by the assessee from its AEs, however, it was observed by him that the benefit which was received from availing the said services could not be shown by the assessee. DRP vide its order dated 26th November, 2014 though accepted that the assessee company had received services from its AEs, but then, it held that the services so received were general in nature.

27. We find that in the backdrop of the aforesaid facts the assessee in order to further substantiate the receipt of intra-group services from its AEs had vide its letter dated 09th April, 2015 submitted supporting documents as "additional evidence" before us, viz. emails, screenshots, manuals, CPA certificates etc. In our considered view, as the assessee was not afforded sufficient opportunity to produce the aforesaid documentary evidence in the course of the proceedings before the lower authorities, and the same would have a bearing on the adjudication of the issue under consideration, therefore, the same in all fairness merits to be admitted. It is stated by the ld. A.R before us that after perusing similar evidence that was submitted by the assessee with the TPO/DRP in the immediately succeeding years i.e A.Y. 2011-12 and A.Y. 2012-13, the said authorities had concluded that services were received by the assessee from the AEs. It was further stated by the ld. A.R that the AEs of the assessee company during the year under consideration i.e A.Y 2010-11 had rendered similar services to its other group companies in India, viz. Dow Chemical International Pvt. Ltd and Rohm & Haas India Pvt. Ltd., and holding the transactions as being at arm's length no adjustment was made by the department in their hands. In the backdrop of the aforesaid facts, it was submitted by the ld. A.R that now when the department had accepted the receipt of the same intra-group services from

the same AEs as being at arm's length price in the case of the other group companies in India, therefore, it could not be allowed to take a contrary stand while framing the assessment in the case of the assessee company. Further, it was submitted by the ld. A.R that similar services were rendered by the AEs in the earlier assessment years, i.e A.Y 2006-07, A.Y 2007-08, A.Y 2008-09 and A.Y 2009-10, and the TPO in his orders passed for the said respective years under Sec. 92CA(3) of the Act holding the services to be at arms' length had not made any adjustment as regards the same. It was averred by the ld. A.R that as there was no change in the facts and circumstances of the assessee's case as in comparison to those of the preceding years, therefore, the TPO was not entitled to adopt a contrary view and draw adverse inferences during the year under consideration. It was submitted by the ld. A.R that the AEs of the assessee company had filed their returns of income and had offered the amount received from the assessee company to tax, and the same had been accepted by the department. In fact, it was submitted by the ld. A.R that in case of one of the AE, viz. Dow Chemical Singapore Pte. Ltd., the assessment and transfer pricing order was passed without making any adjustment. On the basis of the aforesaid facts, it was the claim of the ld. A.R that once the department had accepted that the amounts received by the AEs is chargeable to tax as fees for services rendered and had assessed the same at the rate provided for in the relevant article in the treaty dealing with "fees for technical services", then, it was not open to the department to take a contrary stand and contend that no services had been rendered by the AEs, since the income received by the AEs had already been taxed on the basis that the services had been rendered by them. Adverting to the determining of the arm's length price of the intra-Group services, it was stated by the ld. A.R that the lower authorities had observed that on application of CUP method the arm's length price of the intra-Group Services was determined by the TPO at nil. However, it was stated by the ld. A.R that the TPO without bringing a single comparable on record, and without following any of the method provided in Sec. 92C of the Act had determined the arm's length price of the services received by the assessee from its AEs at Nil. Reiterating the contentions that were advanced while assailing the determination of the ALP of royalty paid by the assessee to its foreign AE at nil by the TPO without following any of the prescribed method provided in Sec. 92C, the ld. A.R had on the same count challenged the validity of the jurisdiction assumed by the TPO for making the transfer pricing adjustment regarding the intra-group services received from its AEs. On the basis of the aforesaid facts, it was submitted by the ld. AR that the TPO/DRP had not only erred on facts in observing that no services had been received by the assessee from its AEs, but had also wrongly assumed jurisdiction in determining the arm's length price of the intra-Group services at Nil as against that worked out by the assessee at Rs.3,99,95,779/-.

28. We have deliberated at length on the issue under consideration and find substantial force in the contentions advanced by the counsel for the assessee. On a perusal of the documentary evidence that has been filed by the assessee before us as "additional evidence", as well those that were filed before the lower

authorities, we are of the considered view that substantial evidence/ material had been placed on record by the assessee to substantiate the fact that it had during the year under consideration received intra-group services from its AEs. In fact, we find that both the lower authorities had admitted that intra-group services were received by the assessee from its AEs. On a perusal of the "remand report", dated 13.11.2014, we find that the TPO had though accepted that services were received by the assessee from its AEs, but, had observed, that the benefit received from availing of such services had not been substantiated by the assessee company. Adopting a similar view, we find that the DRP in its order had held that though the assessee had received the services from its AEs, but then, the same were general in nature. In the backdrop of the aforesaid facts, we find that it is a matter of an admitted fact borne from records that the assessee had received intra-group services from its AEs during the year under consideration. In our considered view, now when it is an undisputed fact that services were rendered by the AEs to the assessee, it was, then, obligatory on the part of the TPO to have benchmarked the said services by adopting any of the method provided in Sec. 92C of the Act. As per the settled position of law, we are of the considered view that the lower authorities had erred in rejecting the benchmarking analysis of the assessee on the ground that the cost and benefit analysis was not done by the assessee, and it had not shown as to what benefit was derived by it from rendition of the aforesaid services by its AEs. We are afraid that the aforesaid observations of the lower authorities cannot be sustained. It is not obligatory for the assessee to demonstrate as to whether or not the international transaction had resulted into an economic benefit or not, for the reason, that the same would depend on various factors and would be beyond the control of the assessee. Apart from that, whether a benefit is obtained is a matter of perception for a businessman, and it is not open for the revenue to sit in judgment over this exercise. Accordingly, we are unable to subscribe to the rejection of the benchmarking analysis by the TPO/DRP, for the reason, that the assessee had failed to demonstrate the benefits which were derived by it from rendition of the services by its AEs. Our aforesaid view is fortified by the following judicial pronouncements:

"(a) CIT vs. Lever India Exports (78 taxmann.com 88) (Bom.)
(b) PCIT vs. RAK Ceramics (78 taxmann.com 230) (AP)
(c) AWB India P. Ltd. Vs. DCIT (50 taxmann.com 323)
(d) Emerson Climate Vs. DCIT (ITA No. 2182/Pun/2013)
(e) Merck Ltd. Vs. DCIT (69 taxmann.com 45)
(f) Schneider Electric India P. Ltd. Vs. DCIT (82 taxmann.com 364)
(g) Sabic Innovative Plastics India P. Ltd. Vs. ACIT (88 taxmann.com 810)

Also, we are unable to persuade ourselves to subscribe to the determination of the ALP of the Intra-Group Services received by the assessee from its AEs at Nil by the TPO without following any of the method provided in Sec. 92C of the Act. As observed by us at length hereinabove, the TPO is obligated to benchmark the

arm's length price of an international transaction by adopting any of the prescribed method contemplated in Sec. 92C of the Act, failing which the adjustments made by him cannot be sustained in the eyes of law. Our aforesaid view is fortified by the following judicial pronouncements :

"(a) CIT Vs. Merck Ltd. (74 taxmann.com 23) (Bom)
(b) CIT vs. Lever India Exports (78 taxmann.com 88) (Bom)
(C) CIT vs. RAK Cermics (78 taxmann.com 230) (AP)
(d) CIT vs. Johnson & Johnson (80 taxmann.com 269) (Bom.)
(e) Firmenich Aromatics Vs. DCIT (ITA No. 2590/Mum/2017)"

Accordingly, in the backdrop of our aforesaid deliberations, the transfer pricing adjustment carried out by the TPO as regards the intra-group services received by the assessee from its AEs cannot be sustained and is liable to be struck down.

29. Although, we have struck down the transfer pricing adjustment in respect of the intra-group Services received by the assessee from its AE, however, for the sake of completeness we shall deal with the claim of the assessee that no such adjustment was even otherwise called for on the merits of the case. It is the claim of the assessee that now when the intra-group services received by its group companies in India from the aforementioned AEs had been held to be at arm's length price, therefore, a contrary stand in the case of the assessee could not have been drawn. Although, we are principally in agreement with the aforesaid claim of the assessee, however, in the absence of the relevant details which would reveal rendition of similar services by the AEs to the other group companies in India and the treatment of the same as being at arm's length by the department in the case of the said latter group concerns, we are unable to summarily accepted the said contention on the very face of it.

30. Further, we find that it is the claim of the assessee that as its AEs had filed their returns of income and offered the amount received from the assessee to tax, which thereafter had been accepted by the department, therefore, once the said receipts are brought to tax in the hands of the AE's as fees for services rendered as per the rates provided for in the relevant article in the tax treaty dealing with fees for technical support services, then, it would not be open for the department to take a contrary stand in the case of the assessee, and contend, that no services had been rendered by the AEs, for the reason, that the said income received by the AEs had been taxed on the basis that the services were rendered by them. Again, we though are principally in agreement with the aforesaid claim of the assessee, however, we find that though the assessee during the year under consideration was in receipt of intra-group services from its various AEs but documentary evidence to support its claim that returns of income had been filed by the AEs and the amounts received from the assessee had been brought to tax in their hands is available before us only in respect of one such AE, viz. Dow Chemical Pacific Singapore Pte. Ltd., and no such details in

respect of the remaining AEs had been brought to our notice. Accordingly, in the backdrop of the fact that complete details in respect of the remaining AEs supporting the aforesaid claim of the assessee are not there before us, we, therefore, refrain from adjudicating the said claim of the assessee.

31. We shall now deal with the contention of the assessee that the TNM method in the backdrop of the peculiar facts of the case was rightly adopted by it to benchmark the transaction of receipt of Intra-Group services. As observed by us hereinabove, the TPO/DRP had rejected the application of TNM method, for the reason, that as it was a separate and distinct transaction, therefore, the same could not have been aggregated and benchmarked by applying the aforesaid method. After rejecting the TNM method applied by the assessee, the TPO/DRP had purported to apply the CUP method without placing on record any comparable transaction to benchmark the said transaction. In our considered view, there is substantial force in the claim of the assessee that as on the one hand, in the absence of any comparable transaction the CUP method could not have been applied, while for on the other hand the other methods i.e Resale Price Method (RPM) Cost Plus Method, (CPM) and Profit Split Method (PSM) are not applicable to the transaction under consideration, therefore, TNM was the only method that could have been applied to benchmark the aforesaid transaction. Our aforesaid view that in case the TPO is not able to bring comparables on record by applying CUP method, then, the TNM method applied by the assessee is to be accepted is supported by the following judicial pronouncements:

“(a) Knorr Bremse vs. ACIT (77 taxmann.com 101) (Delhi)
(b) AWB India P. Ltd. vs. DCIT (50 taxmann.com 323)
(c) Emerson Climate Vs. DCIT (ITA No 2182/Pun/2013)
(d) Merck Ltd. Vs. DCIT (69 taxmann.com 45)
(e) TNS India Vs. ACIT (48 taxmann.com 128)
(f) Schneider Electric India P. Ltd. Vs. DCIT (82 taxmann.com 364)
(g) Sabic Innovative Plastic India P. Ltd. Vs. ACIT (88 taxmann.com 810)

Apart from that, we are also in agreement with the claim of the assessee that now when the TPO/DRP had accepted the benchmarking carried out by the assessee by applying TNM method insofar other transactions are concerned, therefore, it was not open for them to subject the royalty transaction to a separate analysis. In support of our aforesaid observation that once TNM method is accepted for benchmarking, then, the TPO cannot pluck out one transaction and subject it to separate analysis, reliance is placed on the following judicial pronouncements :

(a) Magneti Marelli Powertrain India P. Ltd. (75 taxmann.com 213) (Del.)
(b) Woodward India Pvt. Ltd (ITA No. 916/Del/2015) (Para 5.3-5.5 Pg. 1633-1635 of Compilation).

Accordingly, in the backdrop of our aforesaid deliberations, we are of the

considered view that in light of the aforesaid peculiar facts of the case, the benchmarking of the intra-group services received by the assessee from its AEs by applying TNM method could not have been faulted with by the lower authorities.

32. We may herein observe that the ld. D.R had stated that majority of the payments were made by the assessee to a Chinese AE, which primarily comprised of a payment stated to have been made in respect of services of a person, viz. Mr. Jeorge La Roza who is stated to be responsible for overall commercial performance of the region. It was submitted by the ld. D.R that the assessee except for filing the copies of the e-mails which only revealed the involvement of the aforesaid person in managerial support survives, had however, failed to demonstrate the basis of the cost to the AE. Ld. A.R in his rejoinder submitted that Mr. Jeorge La Roza was the managing director of the company and no payment was made to him except for the cost allocated to the assessee by its AE for the services rendered. Ld. A.R took us through a letter dated 1st Ocober, 2014 filed with the TPO wherein at Sr. No 3 of the reply the said fact was brought to his notice. As regards the nature of services rendered by the aforesaid person alongwith documents supporting the factum of receipt of services, the ld. A.R took us through certain e-mail correspondences between Mr. Jeorge La Roza and Shr. Suresh Ramchandran, Country Manager of the assessee company, Page 661 to 679 of APB. Also, our attention was drawn to the "additional evidence" that was filed by the assessee with the DRP, wherein at Page 469-470 the details as regards the payment made to Mr. Jeorge La Roza were stated.

33. We have perused the documents to which our attention was drawn by the ld. A.R, and find, that the details as regards the services rendered by Mr. Jeorge La Roza to the assessee, as well as the basis of the charge so raised formed part of the "additional evidence" that was filed by the assessee with the DRP. In fact, no adverse inference as regards the aforesaid payment made by the assessee company finds any mention in the order of the DRP. In our considered view, as there is no justifiable reason for drawing of any adverse inferences as regards the payments that were made by the assessee to the aforesaid person, we, thus, not being able to persuade ourselves to subscribe to the claim of the ld. D.R that there was no material available on record which would justify the basis of the costs to the AE, reject the same.

34. In the backdrop of our aforesaid deliberations, we herein vacate the transfer pricing adjustment of Rs.3,99,95,779/- made by the AO/TPO as regards the intra-group services received by the assessee from its aforesaid AEs. The **Grounds of appeal No(s).14 to 20** are partly allowed in terms of our aforesaid observations."

As the order of the DRP for A.Y 2011-12 that was relied upon by the panel while

disposing off the objections of the assessee as regards the issue pertaining to the transfer pricing adjustment made by the TPO towards intra-group services received by the assessee from its AEs had been set aside by the Tribunal, we, thus concurring with the view therein taken respectfully follow the same. Accordingly, the A.O/TPO are herein directed to vacate the transfer pricing adjustment of Rs. 24,42,84,844/- made towards intra-group services received by the assessee from its AEs. The **Grounds of appeal Nos. 17 to 25** are allowed in terms of our aforesaid observations.

13. We shall now deal with the grievance of the assessee that the A.O had erred in computing the Short Term Capital Gain (for short "STCG") on sale of building at RS. 3,05,52,648/- as against Rs. 36,17,750/- reflected in the return of income. The controversy involved in respect of the aforesaid issue lies in a narrow compass. As is discernible from the orders of the lower authorities, the assessee company had during the year in question entered into an agreement with Nisarg Co-operative Housing Society Ltd. for sale of building and land appurtenant thereto situated at Chiplun, Maharashtra in June, 2013. In the course of the assessment proceedings, it was observed by the A.O that though the sale price of the property as per the 'agreement' was Rs. 1,25,00,000/- however, the same as per the stamp duty valuation/market value was Rs. 4,07,06,000/-. It was noticed by the A.O that the assessee had computed the Long Term Capital Gain (for short "LTCG") on the sale of land at Rs. 40,54,167/- and STCG on sale of building at Rs. 36,17,750/-. In the backdrop of the aforesaid facts, the A.O called upon the assessee to put forth an explanation as to why the stamp duty valuation of Rs. 4,07,06,000/- may not be adopted as the deemed sale consideration u/s 50C for the purpose of computing the capital gain on the sale of the property in question. In reply, the assessee vide its submission dated 11.12.2017 assailed the proposed adoption of stamp duty valuation of the aforesaid property of Rs. 4,07,06,000/- as the deemed sale consideration u/s 50

C of the Act inter alia on the ground, viz. (i). that the provisions of the Act provide for a separate mechanism for the computation of capital gains arising on sale of land and the capital gains arising on sale of building, while for as regards the sale transaction in question a lump sum amount was received for the entire property; (ii). that in the backdrop of a separate mechanism for computing of the capital gains on land and building the entire sale consideration of Rs. 1,25,00,000/- could not be compared with the stamp duty value of Rs. 4,07,06,000/-; (iii). that though as per the valuation report, dated 10th April 2013 of a government approved valuer the value of the building was Rs. 89,07,342/- however, the same as per the stamp duty valuation report was valued at Rs. 3,58,42,240/-; and (iv). that as per Sec. 50C the A.O was required to make reference to a valuation officer as defined in and per the provisions of the Wealth tax act, 1957. On the basis of his aforesaid reply, it was submitted by the assesee that the valuation of the government approved valuer be considered as the full value of consideration while computing the capital gains arising on the sale of building. However, the aforesaid claim of the assessee did not find favour with the A.O, who taking cognizance of the fact that the sale consideration as per the 'agreement' was lower than the stamp duty valuation, therein adopted the stamp duty valuation as the deemed sale consideration within the meaning of Sec. 50C of the Act and recomputed the LTCG (on land) at RS. 40,54,167/- <u>and</u> STCG (on building) at Rs. 3,05,52,648/-. As regards the objection raised by the assessee w.r.t the adoption of the stamp duty value as the deemed sale consideration within the meaning of Sec. 50C of the Act, the same was rejected by the A.O, for the reason, that as the assessee had not raised any objection as regards the valuation of the property at the time of registration of the sale documents.

14. Before us, it was submitted by the ld. A.R that as the assessee being aggrieved with the refusal of the A.O to make a reference to the valuation cell had filed an appeal with the CIT(A). It was submitted by the ld. A.R that a

direction may be given that sale consideration for the purpose of Sec. 50C be adopted as would be so directed by the CIT(A).

15. Per contra, the ld. D.R relied on the orders of the lower authorities.

16. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record in context of the aforesaid issue in question. Admittedly, the assessee had vide its letter dated 11.12.2017 objected to the adoption of the stamp valuation rate as the deemed sale consideration for the purpose of computing the capital gain within the meaning of Sec. 50C of the Act. However, as noticed by us hereinabove, the A.O had scrapped the aforesaid objection, for the reasons viz. (i). that the assessee had misinterpreted the provisions of Sec. 50C(2) of the Act; and (ii). that the assessee had never objected to the valuation adopted by the stamp valuation authority at the time of valuation. In our considered view, the A.O had grossly misinterpreted the provisions of Sec. 50C of the Act. AS per Sec. 50C(2), in a case where the assessee had not disputed the value so adopted by the stamp duty valuation authority for the purpose of payment of stamp duty in respect of a capital asset, being land or building or both, in any appeal or revision or no reference has been made before any other authority, court or the High Court, AND the assessee claims before the A.O that the value adopted or assessed by the stamp valuation authority under sub-section (1) i.e in respect of the aforesaid property for the purpose of payment of stamp duty exceeds the fair market value of the property as on the date of transfer, the A.O may refer the valuation of the capital asset to a Valuation Officer. Further, as per sub-section (3) to Sec. 50C, where the value ascertained under sub-section (2) i.e by the Valuation Officer on a reference made by the A.O exceeds the value adopted or assessed by the stamp valuation authority then, the value so adopted or assessed by such authority shall be taken as the full value of consideration

received or accruing as a result of the transfer. In our considered view, in a case where the assessee had neither disputed the value so adopted by the stamp duty valuation authority for the purpose of payment of stamp duty in respect of a capital asset, being land or building or both, in any appeal or revision nor made any reference before any other authority, court or the High Court then, on an objection raised by the assessee to the adoption of the stamp duty valuation as the deemed sale consideration for the purpose of computing of the capital gain for the property in question within the meaning of Sec. 50C of the Act, the A.O is obligated to make a reference to the Valuation Officer for carrying out the valuation of the capital asset in question. Accordingly, we are unable to persuade ourselves to subscribe to the view taken by the A.O that de hors any objection raised by the assessee to the valuation adopted by the stamp valuation authority at the time of valuation, it was divested of its right to seek reference to the Valuation Officer for valuation of the property in question. At the same time, we are unable to comprehend as to on what basis an appeal had been filed by the assessee with the CIT(A) against the refusal on the part of the A.O to make a reference to the Valuation Officer. No such right to prefer an appeal against a declining on the part of the A.O to make a reference to the Valuation Officer within the meaning of Sec. 50C of the Act can be deciphered from Sec. 246A of the Act. Be that as it may, our aforesaid observations are in context of the submission of the ld. A.R that a direction may be given to the A.O to adopt the sale consideration as would be directed by the CIT(A), which being beyond our comprehension is herein rejected. However, in the backdrop of the fact that the assessee before us had neither disputed the value so adopted by the stamp duty valuation authority for the purpose of payment of stamp duty in respect of the property in question, in any appeal or revision nor made any reference before any other authority, court or the High Court, had however, admittedly objected to the adoption of the stamp duty valuation as the deemed sale consideration by the A.O for computing the capital gains within the meaning of Sec. 50C of the Act

thus, we herein direct the A.O to make a reference to the Valuation Officer for the purpose of valuation of the property in question for the purpose of Sec. 50C of the Act. The **Grounds of appeal Nos. 26 to 29** are allowed for statistical purposes in terms of our aforesaid observations.

17. As regards the grievance of the assessee pertaining to allowing of short credit of TDS by the A.O, it was submitted by the ld. A.R that the assessee had filed a rectification application as regards the issue in question, which however is pending before the A.O. It was submitted by the ld. A.R that the A.O may be directed to look into the aforesaid grievance of the assessee. As the adjudication of the aforesaid issue would require verification of the records, we herein direct the A.O to verify the same and redress the aforesaid grievance of the assessee. The **Ground of appeal No. 30** is allowed for statistical purposes.

18. As regards the Grounds of appeal Nos. 31 and 32, we find that it is the claim of the assessee that the A.O had erred in computing the respective interest liability u/ss. 234A and 234B of the Act. It is claimed by the assessee that as it had filed its return of income for the year in question within the 'due date' contemplated in Sec. 139(1) of the Act thus, no interest u/s 234A was liable to be imposed on it. It is further stated by the assessee that the A.O had erred in levying interest u/s 2434B of the Act. It was submitted by the ld. A.R that the assessee's application u/s 154 in context of both the aforesaid issues was pending before the A.O. It was submitted by the ld. A.R that suitable directions may be issued to the A.O. We have given a thoughtful consideration and in the backdrop of the aforesaid claim of the assessee we direct the A.O to consider its aforesaid grievances while giving appellate effect to our order. The **Grounds of appeal nos. 31 and 32** are allowed for statistical purposes in terms of our aforesaid observations.

19. The assessee has assailed before us the initiation of penalty proceedings u/s 271(1)(c) of the Act. As the aforesaid grievance of the assessee is found to be premature, the same, thus, is accordingly dismissed. The **Ground of appeal No. 33** is dismissed.

20. The appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 15.02.2021

Sd/-	Sd/-
S. Rifaur Rahman	Ravish Sood
(ACCOUNTANT MEMBER)	(JUDICIAL MEMBER)

Mumbai, Date:15.02.2021
PS: Rohit

<u>Copy of the Order forwarded to</u> :
1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR “K” Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai.